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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-972

THE WESTERN RAILWAY OF ALABAMA,
A Corporation,
Petitioner,

v.

JOHNNIE F. BLUE,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit on an appeal by the respondent reversing jury verdict in favor of respondent due to errors committed by the trial judge, is attached as Appendix A to the Petition For A Writ Of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

The questions presented in petitioner's application misstate several of the issues presented for review and state other issues which are not relevant.

Simply stated, the questions presented for review are:

1.

In a personal injury action brought under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) and the Federal Safety Appliance Act (45 U.S.C. § 11), has the district court committed reversible error, as held by the Court of Appeals, in refusing to accept *any* evidence as to the gross wages of the plaintiff?

2.

Did the district court commit reversible error, as held by the Court of Appeals, when it charged the jury that in making an award for future loss of earnings, they were to concern themselves *only* with net income?

3.

Did the district court commit reversible error, as held by the Court of Appeals, when it charged the jury that any award for impairment of future earning capacity must be reduced to present cash value by using the interest rate available *at the time and place of trial* rather than the interest rate available over the period of plaintiff's work life expectancy?

STATEMENT OF THE CASE

Respondent filed an action against petitioner in the United States District Court for the Middle District of Alabama under the provisions of the Federal Employers' Liability Act (F.E.L.A.) and the Federal Safety Appliance Act (F.S.A.A.) in which he alleged that he lost his left arm

in an accident occurring on June 26, 1970, due to the negligence of the petitioner in violation of the F.E.L.A. and due to a violation by the petitioner of one of the Federal Safety Appliance Acts, namely the Hand Brake Act. A jury trial was held and respondent was awarded $76,780 by the jury. Respondent appealed and the Fifth Circuit Court of Appeals reversed because it found that the trial court had made the following errors:

1. The trial court refused to allow respondent to prove the amount of gross wages earned by respondent prior to the accident of June 26, 1970, and instructed the jury that in making any award for future impairment of power and capacity to work and earn money they were to concern themselves only with net income.

2. The district court also charged the jury that they must reduce any award for permanent impairment of power and capacity to work and earn money in the future to present cash value by utilizing an interest rate equivalent to the return on high-grade corporate securities prevailing *at the time and place of the trial.*

Because of these errors the Fifth Circuit reversed district court and remanded the case for a new trial.

ARGUMENT RE RULINGS ON GROSS WAGES

The petitioner states at the beginning of the argument that the Fifth Circuit took the "singular step of reversing a district court for adopting and following a respectable line of authority that computation of impaired future earnings in an F.E.L.A. case should be based on a plaintiff's net income after taxes rather than on his gross earnings." Petitioner goes on to state that the Fifth Circuit has for the first time pronounced that a district court has "no discretion in a jury case to use the net income theory." (Petition, p. 8)

We begin by stating that there is no respectable line of authority that the Fifth Circuit declined to follow. The only case that can be said to lend any support to the petitioner's theory is that of *Southern Pacific Co. v. Guthrie*, 186 F. 2d 926, (9th Cir., 1951). Other than this case, no case cited by petitioner, and none that respondent has been able to find, holds that in a jury trial the computation as to damages for impairment of future earning capacity should be based solely on the "net income" figure.

It is important to note here that the respondent did not urge and the Fifth Circuit did not hold that only evidence as to gross wages could be introduced. What it did hold is stated on page 19 of the opinion as follows:

> "Accordingly, we hold that the district court erred in excluding from the jury's consideration evidence of Blue's gross earnings history and in instructing the jury that, in making an award for future loss of earnings, they were to concern themselves only with net income. The jury should have been permitted to receive the evidence as to gross earnings offered by the plaintiff." (Opinion p. 23)

Even the *Guthrie* case did not hold that the jury was not to be allowed to receive evidence of gross wages. Therefore, it is difficult to understand the remainder of petitioner's argument on this case. The cases that it cites do not contain a single holding that evidence of gross wages should be completely excluded from consideration by the jury. No circuit has ever reached such a decision. Petitioner is using a little sleight of hand in attempting to convince this Court that it should review the decision of the Fifth Circuit. First, it misstates the question presented for review by misstating the holding of the Court below. Secondly, it cites cases in support of the misstated issue which do not hold what it says they hold and which, if they did hold such, would not touch the question actually decided by the Court below in the instant case.

There is not a citation of authority in the petition that a jury should not be allowed to receive any evidence of gross wages. The case of *Armentrout v. Virginia Ry. Co.*, 72 F. Supp. 997 (W. Va. 1947) is cited as an authority although the case was reversed by the Fourth Circuit Court of Appeals in 166 F. 2d 400, (4th Cir., 1948).

The petitioner says the case of *McWeeney v. New York. etc. R. Co.*, 282 F. 2d 34, (2nd Cir., 1960), is not good authority in the Second Circuit. This is not a candid statement. The *McWeeney* Case holds unequivocably that no consideration should be given to the incidence of taxation in trials by jury in personal injury actions. In that case the issue as to whether or not income taxes should be considered was squarely presented. This was an F.E.L.A. action for personal injuries tried by a jury. The Second Circuit decided this case *en banc*. The question was whether it was error to refuse the following requested instruction:

> "If your verdict is in favor of plaintiff, you must calculate any past or future loss of earnings on the basis of his net income after deduction of income taxes." (282 F. 2d at 35).

The Second Circuit sitting *en banc* held that it was not error to refuse that charge. In doing so, the Court specifically rejected the holding in the *Guthrie* Case pointing out that the appellate court in that case held they could not determine with precision the future income taxes plaintiff might have to pay and the Second Circuit suggests that if this function could not be performed by an appellate court it could not be performed by a jury. The petitioner cites this case as holding that on some occasions such an instruction might be given and that this uncertainty detracts from the holding of the Second Circuit. This is completely out of context. The Second Circuit pointed out that in some cases, and it used the example of a plaintiff making $100,000.00 a year where more than half of the income

might be eaten up by taxes, some cautionary instruction might be necessary. Then the Second Circuit states:

> ". . . Such cases are in sharp contrast to the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable added exemptions or deductions drastically effect the tax and, . . . for the reasons indicated, the plaintiff is almost certain to be under compensated for loss of earning power in any event." (282 F. 2d at p. 289)

The *McWeeney* Case contains an excellent analysis of the reason for the rule that net earnings and the incidence of taxation are not considered. No proper instruction could be designed that would advise a jury of the factors to be considered.[1]

The petitioner has been less than candid with this Court in citing in support of its position the case of *Wetherbee v. Elgin, Joliet & Eastern Rwy. Co.*, 191 F. 2d 302 (7th Cir. 1951). The *Wetherbee* Case was a death action under the F.E.L.A. by the surviving widow and dependent children. The instant case is an action for personal injuries under the F.E.L.A. by the injured person. This Court is well aware that the method of computation of damages in death cases under the F.E.L.A. is the loss of contributions made by the decedent to the qualified dependents.[2] It would be error for the court to consider the gross wages of the decedent in determining the damages to which the dependents would be entitled. In such a case, not only the income tax but the personal living expenses of the decedent would have to be deducted. The death case is not analogous to the per-

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[1]It must be remembered that the question for the jury to decide is the amount of monetary compensation for impairment of earning capacity and not lost wages as such. *Louisville and Nashville R. Co. v. Steel*, 257 Ala. 474, 54 So. 2d 664 (1952). To reach this decision the jury must be allowed to consider and use all evidence bearing on the question of wages earned prior to the date of injury. The rulings and instructions of the court cannot limit the factors the jury can consider without invading the province of the jury.

[2]In *Chesapeake & O. R. Co. v. Kelly*, 241 U.S. 485, among many other cases, this Court held that the damages in a death action under F.E.L.A. would be the pecuniary benefits the qualifying dependents could reasonably expect to receive from the decedent.

sonal injury case as the method of computation of damages for future losses involves a completely different standard. This is exactly what the Seventh Circuit held in the *Wetherbee* Case and it has no application to the instant situation. The exact language of the Court in *Wetherbee* is as follows:

> "... The only figure the jury was authorized to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent. The jury was undoubtedly misled by the actuary's figures of $83,761 and $88,652, based on decedent's probably future gross earnings. We think the receipt of this testimony over defendants's objections was error. (192 F. 2d at 311)

The petitioner states "the Fifth Circuit candidly concedes a split of authority on the question of whether the net income or gross income method is preferable." This is untrue as the Fifth Circuit *made no such concession.*

Petitioner states that *United States v. Furumizo*, 381 F. 2d 965 (9th Cir. 1967), was contrary to the decision of the Fifth Circuit in the instant case. This is untrue. *Furumizo* was a non-jury case and the Ninth Circuit specifically held that the District Court was free to take the effect of taxes into consideration though "*it might not have erred* if it had refused to do so."[3] This case preserves the distinction as to the rule applicable in jury and non-jury cases, but indicates that even in non-jury cases the Ninth Circuit is backing away from the *Guthrie* rule.

The petitioner then seeks to cite the Alabama case of *Atlantic Coastline R. Co. v. McMoy*, 261 Ala. 66, 73 So. 2d 85, for the proposition that net income alone is used in F.E.L.A. cases in Alabama. This was a death case and like the *Wetherbee* case, supra, has no application to a personal injury case because the measure of damages is completely different.

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[3][Emphasis Supplied] 381 F 2d. at p. 971.

Finally, we consider the position of the petitioner that the rule should be discretionary with the trial judge. The petition itself contains a number of citations supporting the proposition that the Supreme Court is determined on a uniform application of the F.E.L.A. and the F.S.A.A. throughout the United States. In fact, the petitioner has cited on page 7 of the petition the case of *Brady v. Southern R. Co.*, 320 U.S. 476, and the following quotation at page 479 of that volume:

> "[o]nly by a uniform federal rule . . . may litigants under the federal act receive similar treatment in all states."

This states the response of the respondent to petitioner's plea for a discretionary rule. Litigants under the F.E.L.A. and F.S.A.A. are entitled to be treated with uniformity. To allow the trial judge to decide in individual cases whether or not the jury will be guided by gross or net wages would be in absolute derogation of an even application of the law.

The net result of petitioner's argument is that it has sought to argue a question not decided by the Fifth Circuit and not before this Court. The Fifth Circuit only decided that evidence of gross wages should be presented to the jury for their use in determining the monetary value of the impaired future earning capacity. Nothing the petitioner has said and no case he had cited touches this point. There is no reason for this Court to grant certiorari on that question.

ARGUMENT REGARDING INTEREST RATE

Regrettably the second section of petitioner's application, that dealing with the rate of interest to be applied in reducing to present value an award for permanent impairment of power and capacity to work and earn money in the future, is based on misinterpretations of the decisions cited by petitioner. The petitioner constantly uses the term

reduction to present value as though it were synonymous with the term *current rates of interest*. This is not accurate.

Petitioner cites the case of *Chicago RI & P R. Co. v. Speth*, 404 F. 2d 291 (8th Cir. 1968), for the proposition that the Eighth Circuit held that all juries should be instructed to use current rates of interest in reducing future damages to present value. This is not what the court held. The dispute in this case arose when the jury returned a verdict in the amount of $16,000.00. Special interrogatories had been propounded to the jury. One required the jury to state the percentage of contributory negligence, if any, they found attributable to the plaintiff. There was also a special interrogatory as to whether or not the jury found that the defendant had violated the Boiler Inspection Act to which contributory negligence would not be a defense. The jury answered both of these questions in the affirmative. The court then asked them whether the $16,000.00 was the whole figure to which they found the plaintiff was entitled or whether it was a figure after deduction for contributory negligence. The jury answered it was the figure after deduction for contributory negligence. In view of the fact that contributory negligence would not be involved under the Boiler Inspection Act and the jury had found that there was violation of the Boiler Inspection Act proximately causing the plaintiff's injury, the judge told the jury to return to the jury room and complete the form as to the total damage "irrespective of deductions, contributory negligence or anything else." The jury then brought back a verdict of $40,000.00.

The Eighth Circuit reversed the case on the basis that the judge's statement precluded a reduction to present value by *any* interest rate. The portion of the opinion quoted by petitioner on page 16 of its application is completely out of context. The exact quotation in its proper context is as follows, after the court pointed out the statement the judge made to the jury about recomputing the verdict:

> "The jury had been previously told in the original instructions that all future damages awarded should be reduced to their present worth taking into consideration factors of life expectancy and current rates of interest. The effect of the court's later instruction was to nullify *completely* its prior instructions on present worth. This was prejudicial error to the defendant." [Emphasis Supplied] (404 F. 2d at p. 296).

Thus, the question as to the phraseology of the trial court's charge on "current rates of interest" was not before the court for decision. The court held that the subsequent statement of the judge to the jury eliminated any consideration as to reduction of present worth. This is far from the proposition for which the petitioner cites the case.

In footnote 7 on page 16 of the petition a number of cases are cited for the proposition that "it is the 'present' or 'current' investment rate which the jury is to find in arriving at an appropriate discount factor". *Not one of the cases cited by petitioner supports that proposition.*

The Alabama Supreme Court in the case of *Seaboard Coast Line Railroad Company v. Whitehead*, ... Ala. ....., 262 So. 2d 752 (1972), has decided this question in an F.E.L.A. personal injury action squarely against the position taken by petitioner. This was a trial in Birmingham, Alabama. Plaintiff's counsel asked the following question of the actuary who had taken the stand to testify as an expert witness:

> " 'Q Based on that knowledge and your knowledge of investing funds and reasonably prudent investors funds, (sic) do you have an opinion as to what rate of interest a prudent investor of funds could obtain on invested funds over the period of time now until the gentleman is 70 years old, and how long would that be? Did you figure that?
>
> 'A It would be 22.59 years.
>
> 'Q All right. For that length of time, what would be—do you have an opinion as to what a reason-

able prudent investor of funds could receive on invested funds for that length of time?

'A Yes, sir.

'Q What is that opinion? (262 So. 2d at p. 754-755).

The grounds of objection by railroad counsel was that the only interest rate applicable would be the highest interest rate obtainable at the date of trial in the Birmingham locality. The Supreme Court upheld the trial court in allowing the actuary to testify over this objection as to the rate of interest obtainable over the period of plaintiff's work life expectancy as follows:

"From an examination of the actuary's entire testimony, we do not believe the spirit and intent of the law with respect to the earning capacity of money as set out in Mobile & O. R. R. Co. v. Williams 219 Ala. 238, 121 So. 722 (1929); and Mobile & O. R. R. Co. v. Williams, 221 Ala. 402, 129 So. 60 (1930) was violated. The actuary testified that at the time of trial the plaintiff had a life expectancy of 22.59 years. The actuary was permitted to testify that, in his opinion, the rate of interest a prudent investor of funds could obtain during this period would be 4.5 to 5 percent."

* * *

We have no way of knowing what rate of interest the jury used in arriving at its verdict, but we think no reversible error is shown in permitting the testimony of the actuary." (262 So. 2d at p. 755)

The Supreme Court of Alabama thus affirms the true rule that the jury decides the appropriate interest rate and must have future projections as well as current rates to do this because the true rule is the rate obtainable over the period of the loss.

In addition to this case the weight of authority is clearly against petitioner.

In the early case of *Chesapeake and Ohio Railway Co. v. Kelly*, 241 U.S. 485, 60 L. ed. 1117 (1916), the Supreme

Court of the United States considered the question of discounting payments for future losses. The court held that such payments must be reduced to their present value and that this should be done by having the jury determine the rate of interest that the money awarded would earn over the period for which the losses were being awarded. The court also made it clear that this was a determination to be made by the jury and made the following statement:

> "We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rests, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say." (241 U.S. at p. 491)

In the later case of *Gulf, Colorado and Santa Fe Railway Co. v. Moser,* 275 U.S. 133, 72 L. ed. 200 (1927), the Supreme Court of the United States reversed a decision in favor of the plaintiff for failure of the trial court to give the following requested instruction:

> "In considering of your verdict on the question of damages, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for the pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased you will make your calculations on the basis of the amount of your award, bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case." (275 U.S. at p. 135).

The Supreme Court held that it was material error to fail to give the instruction. This instruction allows the jury to determine the rate of interest that should be applicable from the evidence in the case. The instruction of the trial court in the instant case restricted the jury to the rate of interest available in Montgomery, Alabama, at the time of trial and was clearly erroneous. Furthermore, the evidence as to the current rate of interest was introduced by the petitioner through cross examination of respondent's expert economist and was limited solely to the interest rate available at the time of trial. Thus, the court's instruction, in effect, limited the jury to using the figures introduced by the petitioner as this was the only evidence of interest rates at the time of trial and forced the jury to drop from their consideration the testimony of the interest rate available over the period of plaintiff's work life expectancy.

The respondent's contention that the question of the discount rate to be applied is for the jury to determine is strongly supported by the case of the Supreme Court of the United States, *Western & Atlantic Railroad Co. v. Hughes*, 278 U.S. 496, 73 L. ed. 473 (1929). In this case the plaintiff introduced only the mortality tables and annuity tables showing the present value of money at various interest rates. The railroad company argued that this evidence was insufficient to justify a verdict for future losses because it did not provide sufficient information for the jury to determine the present value. The Supreme Court rejected this contention holding that there was ample evidence for the jury to make this determination.

In the case of *Pennsylvania Railroad Company v. McKinley*, 288 F. 2d 262 (6th Cir. 1961), a similar contention was made by the defendant. The court rejected the contention and in its decision left the matter of the rate of interest at which the discount was to be made solely within the discretion of the jury in the following language:

> "It is clear that under the rulings of *Chesapeake & O. Ry. v. Kelly,* supra; *Chesapeake & O. Ry. v. Gainey,* supra; *Gulf, C. & S. F. Ry. v. Moser,* supra; *Thompson v. Camp,* 6 Cir., 1947, 163 F. 2d 396; *Southern Ry. Co. v. Neese,* 4 Cir., 1954, 216 F. 2d 772, standard annuity tables, expert evidence as to earning power of money safely invested, and like testimony would be admissible. No case, however, has been cited to us from the federal or state courts which has held that such proof is essential.
>
> "Jurors are presumed to be intelligent people, generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments. While, indeed, more could have been said on the subject, if request had been made, we cannot say that the jury misunderstood the trial judge when he told them that for future loss of earning capacity they were to award only the 'money value' of such loss and to award only such sum as would 'compensate' for the plaintiff's loss of future earning capacity. They were aware that their verdict would be presently and immediately placing money in the hands of the plaintiff as 'compensation' for these future losses." (at p. 265)

An excellent statement of the type of charge that should be given in this connection is sought in the case of *Texas & Pacific Railway Co. v. Perkins,* 48 S.W. 2d 249 (Tex. 1932). In that case the court held that it was erroneous to refuse the following instruction to the jury:

> "In determining the present value thereof, you should take into consideration the rate of interest at which money can be safely and securely invested and determine the present value of any amount you may so allow by discounting the same, or deducting therefrom annually an amount equal to the rate of interest at which such sum could be safely and securely invested during the period for which you may allow such damages and make the balance your answer." [Emphasis Supplied] (48 S.W. 2d at 250)

The practical application of this calculation is best outlined in an excellent opinion in the case of *Meehan v. Central Railroad Company of New Jersey*, 181 F. Supp. 594, (U.S.D.C., S.D., N.Y. — 1960). This was a wrongful death action brought on behalf of the estate of the decedent to recover, among other things, compensation for the loss of future earnings from the decedent. The case was tried to a jury verdict for $315,000.00. The defendant filed a motion for new trial and the court dealt with the merits of that motion. The motion of the defendant attacked the amount awarded for loss of future earnings and the interest rate applied in discounting that amount to present value. The only testimony in the case concerning the earning power of money was from an actuary employed by the Equitable Life Assurance Society and offered by plaintiff. The following excerpts from the court's opinion concerning this matter clearly support plaintiff's contention in the instant case and clearly explain the function of the jury in determining the present value the basis on which such determination should be made:

> "Shelly [the actuarial expert] testified that the interest rate was dependent on the length of time of the investment. He stated: 'Right now, for something that would be 30, 40 years in the future, it would seem reasonable to me to assume no more than 3 per cent. (SM 451)
>
> "He stated that if the investment were only for five years, that 3½ to 4 per cent might be the reasonable rate of return Shelly testified that he was familiar with interest rates on government bonds and rates paid by savings banks.
>
> "He concluded that keeping in mind the length of time of the investment, the possibility of reinvestment and diversification of the investment, that 3% would be the reasonable rate of interest. (181 F. Supp. at p. 609)

* * *

> ". . . fully cognizant of the fact that it is possible to obtain a yield of 4% on United States Government Bonds purchased at this time, the following facts, to wit, that the only testimony in the case emphasized the reasonableness of a 3% return, that the rate is to be that which persons 'without financial skill could safely secure', and that it would be impossible to prophesy that the interest rates will be as high in the future as they are today, persuade me that a reasonable man on the jury could very well have concluded that the discount rate to be applied should be 3%. Accordingly, a discount rate of 3% will be employed to find the present value of the prospective pecuniary loss." (181 F. Supp. at p. 610).

It is clear from this opinion that this court is refusing to base its decision solely on the interest rate available at the time of the trial and that it is leaving to the jury the determination as to what the interest rate should be to discount the award for future earnings and present value. This is clearly the only common sense approach to the problem and it is clearly the recognized law.

PETITIONER'S OTHER QUESTIONS

The petitioner has raised two additional questions for review. First, the petitioner asks this court whether it is necessary to have a uniform rule as to the two questions considered and discussed above in order to achieve a safe application of the F.E.L.A. and F.S.A.A. Respondent's judgment is that this question answers itself. Secondly, the petitioner asks whether the Fifth Circuit was justified in reversing a case in which the jury had awarded $76,780 when it recognized that the defendant had "not insubstantial defense". This is a spurious question. After the jury was improperly instructed by the court, then the case must be reversed, and the fact that the petitioner may have had a "not insubstantial defense" would not touch the effect of the erroneous instructions to the jury with regard to dam-

ages. This question is, in the judgment of respondent, irrelevant to a consideration of this case by this court.

CONCLUSION

For the reasons set forth above, respondent respectfully insists that there is no reason for this court to grant certiorari in this case. The Fifth Circuit has done nothing more than to correct legal errors in instructions given by a district judge in a personal injury case. Surely, this is a function that must be left at the Court of Appeals level unless there are extraordinary circumstances. Those do not appear in this case. Petitioner has been unable to present a split of authority between the circuits which would constitute the only possible basis for this Court to grant certiorari. Respondent respectfully requests that the petition be denied.

Respectfully submitted

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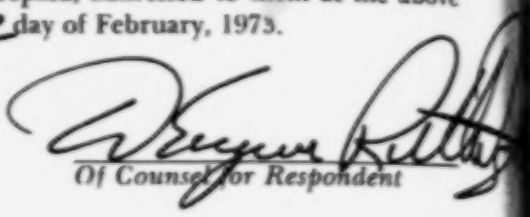
CERTIFICATE OF SERVICE

I, W. Eugene Rutledge, counsel for respondent and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Brief of Respondent in Opposition on Messrs. Steiner, Crum & Baker, 1109 First National Bank Building, P. O. Box 668, Montgomery, Alabama, attorneys for petitioner, by depositing the same in a United States post office, with first class postage prepaid, addressed to them at the above address, this the 2 day of February, 1973.



Of Counsel for Respondent